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No. 61

JOHN HUGHES and LOUIS RICHARDSON,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA,
Respondent.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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The members of the Congress of Industrial Organizations have a two-fold interest in this case. The case involves, first, the right of Negro organizations, not affiliated with any labor movement, to combat discriminatory employment practices by publicizing the fact that certain employers do not hire Negro labor in proportion to their Negro patronage. Second, it involves the right of any organizations, including labor organizations, to publicize the facts of a dispute by walking in front of an establishment carrying placards which truthfully state those facts, i.e., to picket.

I

We support wholeheartedly the petitioners' contention that the picketing which lead to their conviction for contempt was entirely lawful and proper and contravened no canons of public policy. Indeed, we urge most strongly that the endeavor to combat discrimination against Negroes by picketing those establishments in Negro areas which refuse to hire qualified

Negroes is one which is laudable and deserves the strongest support.

It is perhaps true that the employment of Negroes in proportion to Negro trade is not the ideal solution to the problem of discrimination against Negroes in retail employment. The ideal would be the employment of qualified persons without regard to color. A Fair Employment Practice Act, making it unlawful for employers to discriminate on the basis of race or color, if rigorously enforced, is undoubtedly a more satisfactory solution to the problem of discrimination than the one attempted by the petitioners here, and the CIO vigorously supports the enactment of such laws.

But ideals are not facts. California has no Fair Employment Practice Act and the Federal government has none. In the absence of such legislation, employers are free to choose their employees on the basis of color and the overwhelming fact is that they use this freedom to deny employment to qualified Negro personnel and thus perpetuate the economic handicap which retards the Negro race from attaining equality in all spheres of life.

The campaigns by Negro organizations to obtain the employment in retail stores of a percentage of Negro help equal to the percentage of Negro patronage is a campaign to restrict the effects of discrimination by obtaining a certain limited number of employment opportunities for Negroes. The antidote thus striven for is not the perfect remedy. But it is the only practicable remedy available to Negro organizations in the absence of Fair Employment Practices legislation, since discrimination is not illegal and non-discrimination cannot be policed by private organizations without sanction of law. Certainly, this court, in *New Negro Alliance* v. *Sanitary Grocery*, 303 U. S. 552, recognized that the demand for proportionate hiring was a legitimate weapon in the struggle against discrimination.

The California Supreme Court, however, assumed the ideal and ignored the facts. It ignored the broad pattern of existing discrimination against Negroes and found that the countermeasure here involved was an improper one because it did not set up an ideal standard. The California Supreme Court

had previously held that it was against public policy to enforce a closed shop contract when the union holding the contract was closed to qualified Negroes. *James v. Marinship Corp.*, 25 Cal. 2d 721. In the present case, the Court said that the Negro race was the same thing as a union which refused admission to qualified persons because of their color. And it held that the petitioners, by seeking the employment of a fixed percentage of Negroes, were seeking to impose a partial "closed shop" for their "closed union." And this, said the California Court, was an "unlawful purpose."

As the petitioners have pointed out, this application of logic, devoid of any recognition of the factual background involved, is plainly erroneous. It is a mechanical application of formula which "treats society as though it consisted of bloodless categories." It ignores the overwhelming fact that in society, as it exists, discrimination against Negroes in retail employment is the rule rather than the exception. In condemning the efforts of Negro organizations to supply an antidote for this discrimination because it involved a theoretical possibility of discrimination against whites, the court let its logic obscure the facts of life. Its condemnation, which might make sense if there were in fact no discrimination against Negroes, or if there were a law forbidding such discrimination, makes no sense in the face of the discrimination which does exist and which, unfortunately, is permitted under existing law.

II

The California court thus gave what we believe to be an erroneous answer to the question it asked: was the objective of the petitioners' picketing a proper one? We think it erred even more seriously in even asking that question.

Let there be no mistake as to the issue upon which both the Superior Court and the Supreme Court of California

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[1] Under the California practice, the granting of a hearing by the Supreme Court nullifies the decision of the District Court of Appeal. The Supreme Court treats the case as an appeal from the Superior Court and either affirms or reverses that Court. The Court of Appeal decision in effect disappears from the case. It is not reported in the official California reports.

decided this case. There was no issue as to whether the petitioners' activity violated any California statute, either criminal or civil. It clearly did not. Nor was there any issue as to whether their objective, if achieved, would constitute a violation by the employer of any civil or criminal provision. It clearly would not. The sole question posed by the California courts was whether the objective was an "improper" one.

Thus, the Superior Court, whose opinion is quoted by the District Court of Appeal at R. 70-71, said:

> "A balancing of advantages to the defendants as against the disadvantages to this plaintiff and to the social order as a whole clearly points to disapproval of the acts complained of.
>
> "As a matter of principle, based upon a sound public policy, the Court cannot lend its assistance to this movement. It must protect not only this plaintiff but the community as a whole from the dangers which exist in continued activity along these lines."

When the District Court of Appeal quite properly reversed this holding of the Superior Court, the respondent petitioned the Supreme Court for a hearing. In that petition, the respondent said that three questions were raised by the case (R. 55). The first two concerned matters no longer in issue and not relevant here. The third was this:

> "3—Whether the demand by defendants for proportional hiring of Negroes, based upon the number of Negro customers patronizing Lucky's Canal Street Store, was an improper objective, and can this demand properly be urged through the medium of a picket line where there is no labor dispute between the employer and the group or persons who are picketing?"

The respondent contended that the District Court of Appeal had erred in deciding this point because (R. 57) "The Objective of Employment of Negroes in Proportion to Negro Patronage Is an Improper One." The California Supreme Court granted the respondent's petition, and after hearing, it agreed that the purpose of the petitioners activity was improper.

The decisions of both of the California Courts rest upon an unstated premise that picketing is, *a priori*, a forbidden activity and that it should be enjoined unless it affirmatively

appears that its objective is a proper one. The California courts thus consider that by simply refusing to enjoin picketing they are really taking affirmative action to aid it. The question is, then, whether the court should "lend its assistance to the movement" (R. 71) and the court will not so lend its assistance unless the objective of the picketers is a proper governmental objective.

This premise is, of course, an insupportable one. As this Court has repeatedly stated in the line of cases beginning with *Senn* v. *Tile Layers Union*, 301 U. S. 468, peaceful and truthful picketing is a form of communication which is entitled to the protection of the First and Fourteenth Amendments. It is not *prima facie* illegal. It is not permissible only where the courts approve of its objectives. To the contrary, unless there are pressing reasons of public policy, it may not be prohibited. The absence of a prohibition is no more an endorsement of the picketers' purposes than is the absence of restraint on political advocacy an endorsement of the advocate's objectives.

True, there are areas in which a state may limit the peaceful dissemination of information by the carrying of placards. The exact limitation of those areas is not yet clearly settled. Certain guide posts have been established. The Court has held that picketing by a union cannot be enjoined solely because the union does not represent the employees of the concern picketed. *A. F. of L.* v. *Swing* 312 U.S. 321; *Cafeteria Employees* v. *Angelos*, 320 U.S. 293. Nor can picketing be limited to state defined "labor disputes," or to the particular employer involved in a dispute. *Cafeteria Employees* v. *Angelos, supra; Bakery & Pastry Drivers* v. *Wohl*, 315 U.S. 769. Compare *Casselman* v. *Idaho*, 205 P. 2d 1131, certiorari applied for, No. 358, this Term.

On the other hand, the Court has, by a divided vote, ruled that peaceful picketing can be limited to the industrial area in which a labor dispute arises, so as to prevent the conscription of neutrals. *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722. And it unanimously held, in *Gibony* v. *Empire Storage & Ice Company*, 336 U.S. 490, that picketing which was merely the use of speech is a part of a conspiracy to induce a violation of a criminal statute could be enjoined.

Only in the last named decision has the question of objective been deemed material by this Court. In the other cases, the issue was whether the circumstances in which the picketing took place constituted a sufficient basis for the state to limit or restrain it, even though it be regarded as a channel of communication.[*] In none of them did the Court indicate that the constitutional right to use placards to disseminate information depended on the objective for which the communication was made.

Nor, in the *Giboney* case, did the Court give the slightest basis for justification of the California approach. No doubt recognizing that a limitation on speech in terms of its purpose was dangerous doctrine, the Court quite carefully stated that the picketing there was enjoinable only because it was "an essential and inseparable part of a course of conduct which is in violation of the state law." The picketing was, in fact, "an integral part of conduct in violation of a valid criminal statute" and was, therefore, enjoinable.

This is a far cry from the standard applied by the California courts in the present case. Here there is no "violation of a valid criminal statute." Indeed, the petitioners' objective—the proportionate hiring of Negroes—would not be a violation of any law, criminal or civil, judge-made or statutory.

The distinction between the *Giboney* case and the present case is thus not just a distinction between judge-made and statutory law, nor just a distinction between criminal and civil law. The distinction is a more important one. It is between a rule which regards picketing as *prima facie* protected, as are other forms of speech, and permits its restraint only where some serious violation of law affirmatively appears, and an approach which regards picketing as an activity which may be tolerated only if its objectives are such that a court feels may properly be affirmatively supported by the court.

To make this distinction clear, we may assume a case in which the legislature by statute, criminal or civil, prohibited picketing for a closed shop. Such a statute, if stated as a limi-

[*] Cf. *Kovacs* v. *Cooper*, 336 U.S. 53, in which the Court permitted a state agency to forbid the "loud and raucous" use of a different form of communication.

tation on the right to picket for certain purposes, would clearly be unconstitutional if the achievement of those purposes by other methods of speech was permissible.* The legislature, we submit, could not prohibit picketing to obtain a closed shop if it permitted employers to maintain closed shops and permitted employees to ask for a closed shop in other ways. The legislative restraint in such a case would not be directed against the closed shop but would be a direct restraint on a particular form of advocacy for an objective in itself lawful.

On the other hand, if the legislature found that the closed shop was itself a bad thing and forbade employers to enter into closed shop agreements, then it might be argued that picketing which is part of a course of conduct designed to induce violation of that statute could be restrained, under the rule of the *Giboney* case. In such a situation, the legislative restraint would not be directed at picketing, or at speech or advocacy, but at a practice of employers which the legislature found to be substantively undesirable. Picketing could be restrained, not because of any evil in itself, but because of its part in a conspiracy, all of which could be restrained, to achieve violation by the employer of a valid statutory prohibition.

The "unlawful purpose" doctrine of the California courts clearly is not a doctrine of the latter type. There is not even a suggestion that the course of conduct which the petitioners were seeking to induce the person picketed to adopt would itself be "unlawful", either under the statutes or the judge-made common law of California. The opinion of the California Supreme Court in the present case does not purport to say that the practice of proportionate hiring is either criminal or enjoinable in California. The "unlawful purpose" doctrine, in short, is not based on the assumed unlawfulness of the picketers' purpose *per se*. To the contrary, the purpose is stated only to be one for which it is *unlawful to picket*. Between these two formulations there is a vast difference. The first derives from a limitation on the substantive conduct of em-

*We exclude, for purposes of this example, the case in which the legislature finds that certain types of picketing are likely to lead to violence, etc.

ployers. The second is solely a limitation on picketing as a form of speech and, as such, we submit, is unconstitutional.

The California doctrine is based on the assumption that, by permitting picketing in a particular case, the state is giving an affirmative sanction to its objectives. On that assumption, the only objectives for which one may lawfully picket are objectives which the court itself would enforce. Whatever limitations the court may impose on its own actions, either on policy or on constitutional grounds, are thus made applicable to private advocacy by picketing.

This concept is not only at variance with every decision of this Court dealing with picketing, more importantly, it is a concept which ignores the basic difference between state action and private action upon which so many of our constitutional doctrines rest. See *Shelley* v. *Kraemer*, 334 U.S. 1; *Civil Rights Cases*, 109 U.S. 3. The limitations imposed by constitutional and policy concepts on state action cannot properly be imposed *pari passu* on the private advocacy of individual action. Freedom of speech, if it has any meaning, must mean freedom to advocate that other individuals adopt policies and actions which the state itself might not adopt, so long, at least, as those actions do not themselves violate state law.

In failing to recognize the basic difference between state action and private action and by limiting picketing to the advocacy of those objectives which the policy of the state favors, the California courts, we submit, have imposed a clearly unconstitutional limitation on an activity which, in this case in particular, is clearly speech and nothing else.

Respectfully submitted,

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